JD–11–10
Newark, NJ

STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GREAT LAKES GRANITE AND
MARBLE COMPANY Case No. 7–CA–51922

and

ERIC WULFF, an Individual

Ingrid Kock, Esq., for the General Counsel.
Robert Cleary, Esq., (Warner Norcross & Judd LLP),
of Southfield, Michigan, for the Respondent.

DECISION

Statement of the Case

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Detroit, Michigan on October 13–14, 2009. The charge was filed March 23, 2009, the amended charge was filed July 29 and the complaint issued July 31. The complaint, as initially amended, alleged that the Company, on October 9, 2008,[1] by its agents Joseph Durphee and Rafael Bernal Mendez, threatened employees with discharge because they engaged in union activities.[2] The complaint further alleges that the Company discharged Eric Wulff on that day because he engaged in protected concerted activity by engaging in activities in support of the Bricklayers and Allied Craftworkers, Local 1 (the Union). At trial, the General Counsel withdrew the Section 8(a)(1) charge, leaving only the Section 8a(3) charge. The Company denies the material allegations in the complaint. The Company moved to dismiss the complaint at the conclusion of the General Counsel's prima facie case. I reserved decision on that motion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, has been engaged in the residential installation of granite countertops at its facility in Redford, Michigan, where it annually receives goods and materials valued in excess of $50,000 directly from points located outside the state of Michigan. The Company admits and I find that it is an employer engaged in commerce within the meaning of

[1] All dates are 2008 unless otherwise indicated.

[2] At the outset of trial, the General Counsel withdrew the complaint allegation at paragraph 6 that Company supervisors Joseph Durfee and Rafael Bernal Mendez threatened employees with discharge because they engaged in protected concerted activity. (Tr. 8.)

Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Company's Operations and Procedures

The Company fabricates and installs marble and granite in the residential market. Based on orders by retailers such as Home Depot or individuals, a measurer would go out and measure and then the order would be given for fabrication. In 2008, the Company employed approximately 52 employees and managers, including 10 installers and helpers.[3]

Richard Booms owns the Company. Ray Hochradel, a former police officer, was hired by Booms in November 2007 as his primary problem-solver. Initially, he was asked to address problems in the warehouse. In January 2008, Booms assigned Hochradel to the fabrication shop to address quality issues. In May or June, Booms reassigned Hochradel to deal with problems with the measurers and installers. Booms put him in charge of the measurers and installers in early September 2008.[4] Joseph Durphee is employed as production manager and Rafael Bernal Mendez is employed as sales manager.[5] At all relevant times, Robert Smith was employed as an installation supervisor.[6] Eric Wulff was employed by the Company from August 2006 through October 9, 2008 as a granite and marble installer.

Booms also owns the Booms Stone Company (Booms Stone), which is located on the adjacent property. Booms Stone, whose employees are represented by the Union, performs marble and stone installations in the commercial market. Booms occasionally pays Company employees for work performed on Booms Stone's jobs. However, Mark Pulask, a mechanic-driver, is the only employee on the payroll of both the Company and Booms Stone.[7]

In December 2007, Booms modified the manner by which employees would be paid, effective January 2008, from an hourly rate of $19.50 to $7.25 an hour, plus $1 per foot of material installed, $.75 per foot for backsplash and $.90 per square foot of back splashes measured. He also implemented a policy that any installations resulting in broken pieces or recuts would be deducted from installers' paychecks. Installers were required to sign and agree to the new policy or face discharge.[8]

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[3] GC Exh. 24.

[4] Based on the significant responsibilities assigned to Hochradel, notwithstanding his lack of prior experience in granite and marble, I find that he and Booms worked closely together and maintained continuous communication regarding the Company's operations. (Tr. 218, 299–300.)

[5] Neither Durfee nor Bernal testified at trial.

[6] The General Counsel's motion to amend adding Smith as a supervisor was unopposed and the parties stipulated to be a supervisor (Jt. Exh. 1.)

[7] Booms initially denied any "integration of the two companies with respect to employees. (Tr. 200–203.) After evading the question on cross-examination, he was confronted with a prior deposition testimony and conceded that Pulaski was on the payroll of both companies. (Tr. 214–215.)See also GC Exhs. 26(t), 26(v), and 26(z).

[8] Wulff was a credible witness who was consistently as responsive to cross-examination as he was to direct examination. In this instance, I credited his testimony that Bernal, who did not testify, told him to sign it or face discharge. (Tr. 31; GC Exh. 5.)

The Company's Employee Handbook, issued May 2007, contains its' procedures, policies and regulations.[9] Of particular relevance to this controversy are the provisions relating to employee discipline and examples of unsatisfactory work performance. An employee may be terminated, suspended, demoted or incur a decrease in pay for unsatisfactory performance or conduct. Pertinent examples of "unsatisfactory work performance" include: performing assigned duties in an unsatisfactory manner; falsifying records; reports or other information; insubordination; negligence; and rude or discourteous behavior.[10]

The Company's Relationship with the Union

The Company's employees have never been represented by a union. Booms Stone had no conflicts with the Union during the first 22 years of the Company's existence. However, prior to 2004, the Bricklayers and Allied Craftworkers, Local 32 or its successor Local 1 (Union) attempted to organize the Company's employees. Booms met with Union representative Tim Ochalek in Detroit in 2004 or 2005 to discuss the Union's representation of the Company's employees. Those negotiations, however, were unsuccessful and, on May 19, 2004, the Union filed suit alleging that the Company was created in order to avoid paying fringe benefit obligations to Booms Stone bargaining unit employees, was an alter ego of Booms Stone, and intermingled employees and supplies with Booms Stone. The Union eventually withdrew from the suit.[11] After the suit was over, Booms told supervisor Robert Smith that, if the Union ever came in, he would lay off most Company employees, retain several key employees, close the Company's doors and start over.[12]

Wulff's Performance History

Throughout most of Wulff's tenure with the Company, the Company appreciated Wulff's performance. He had a proportionately small share of the customer complaints made during the installation process—only 2 to 3 percent.[13] Although the Company preferred that Wulff use a seamer to cut the granite, he preferred not to use it.[14] However, the Company did not hold that against him and he received excellent evaluations in November 2006 and June 2007.[15] In fact, Wulff was one of the two highest earners of excellence pins based on a batting average[16] of

[9] ALJ Exh. 1, p. 6.

[10] Id., p. 29.

[11] I base findings regarding the Company's history with the Union on Ochalek's credible testimony. (Tr. 156–157, 160–161, 163.) Booms initially denied such a history, but later conceded that the Union filed an earlier lawsuit involving the Company. (Tr. 211–213; R. Exh. 1.)

[12] Smith's credible testimony that Booms made the statement 3 or 4 years ago around the time of the lawsuit, was not denied by Booms. (Tr. 121–123.)

[13] This finding is based on Smith's credible and unrefuted testimony that Wulff had only 2–3 percent of the approximately 300 installation complaints made each year. (Tr.113–114.)

[14] Smith credibly testified that Wulff was directed to use the seamer, but conceded that no discipline was ever issued. (Tr. 119–120.) Moreover, Hochradel conceded that the Company's Employee Manual does not contain a rule requiring the use of a seamer on jobs. (Tr. 295–296.)

[15] The issue of Wulff's recalcitrance regarding the seamer was raised on cross-examination, but did not appear to detract from any of his evaluations. (Tr. GC 12–13; Tr. 108–110.)

[16] The batting average, which was typically contained in evaluations, reflected the percentage of installations in a given month without broken pieces or recuts. (Tr. 24, 85, 169, 283; GC Exhs. 18–19.)

over 90 percent for 11 of the 16 months that the award was given before being discontinued in late 2007 or early 2008.[17]

The pinnacle of Wulff's tenure came in August 2007 when the Company awarded him the employee of the month award. The award was signed by Booms and Bernal and noted that the "quality and quantity of completed jobs has been far above the benchmarks by the company standards." It also noted Wulff's 95 percent batting average and excellent relationship with peers.[18] Wulff's relationship with the Company started to change after January 2008. That month, the Company changed the manner in which it compensated installers. Instead of a straight hourly salary rate, installers' wages were calculated on the basis of materials installed, minus deductions for recuts.[19] In March 2008, Wulff began complaining to Durfee that his paychecks were incorrect and did not reflect full compensation for jobs that he performed. Durfee reported Wulff's complaints to Booms.[20] He also spoke with other employees about the improper deductions from his paycheck. [21]

Durfee addressed the issue, but Wulff only received part of the money owed him. Wulff then confronted Booms on or about March 20. Booms told Wulff that they would meet with Durfee and Bernal the next day, on March 21. The meeting took place with Bernal and Durfee present, but Booms did not attend. Durfee explained that the Company was "sick" of Wulff's complaining about his incorrect paychecks and Bernal proceeded to read from an Employee Notice Form, which listed nine jobs and stated that Wulff had more broken parts or "recuts" in 2008 than any other installer.[22]

Although Wulff's performance diminished somewhat from his 2006–2007 level, the Employee Notice Form was only partially correct and exaggerated the extent of the problem from a relative and historical standpoint.[23] First, problems with two of the installations were not attributable to Wulff: he did not perform the initial installation on the DePriest job and did not

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[17] GC Exh. 4.

[18] GC Exhs. 4, 12–13.

[19] GC Exh. 5.

[20] Wulff's unrefuted testimony was corroborated by Smith, as well as Booms' concession in his March 29, 2009 letter to a Board attorney that Wulff "continuously questioned his paychecks." (Tr. 21–24, 29, 31–32, 85, 108–110, 134–135; GC Exh. 16.)

[21] Although Booms conceded that several Company employees have filed wage complaints with the State of Michigan, there was no indication that anyone, including Wulff, filed one prior to October 2008. (Tr. 213.) Wulff later filed a wage complaint and the Company was ordered to reimburse him $969.26 for improper deductions on the ground that they were implemented without Wulff's consent, as required by Michigan law. (GC Exh. 22, p.2.)

[22] I base this finding on Wulff's credible and unrefuted testimony. (Tr. 33–34.)

[23] Smith provided a mixed picture of Wulff's performance in 2008. He generated Wulff's 2006 and 2007 evaluations and was the supervisor most knowledgeable about Wulff's abilities. While I credited Smith's testimony that the quality of Wulff's work decreased after he was issued the PIP in March 2008, I did not adopt his opinion that the issuance of the PIP was unrelated to Wulff's complaints, especially in light of the fact that neither Bernal nor Durfee testified. (Tr. 134–137, 144–145, 148.) Moreover, I did not credit Hochradel's vague testimony about Smith coming to him at some unspecified point and recommending that Hochradel be terminated. First, Smith did not corroborate such an allegation; he merely testified that he concurred with the issuance of the PIP in March by Durfee and Bernal. Second, Hochradel had little involvement with Wulff prior to October 2008. (Tr. 220.)

work at all on the Kutney job.[24] Secondly, two other installers, Juan Levine and Robert Smith, had more recuts than Wulff up to that point. Moreover, Wulff's recuts from January to March 2008 were significantly less than his recuts during the period of January to May 2007, which amount was described in his June 2007 evaluation as "minimal recuts" and resulted in an excellent evaluation.[25]

As a result, Wulff was issued a Personal Improvement Plan (PIP) and disciplined for 90 days with a 30 percent salary reduction and demotion from lead installer to helper. Hochradel reinstated Wulff to lead installer at his previous rate of pay in June – several weeks before the end of the 90-day period.[26] However, in August 2008, Wulff noticed again that his paychecks were several hundred dollars short. Wulff spoke again with Durfee, who assured him that he would look into the problem. Durfee never corrected the problem.[27]

In early October, Hochradel took over Smith's supervisory responsibilities.[28] At the time, Wulff's had not yet received his 2008 evaluation. However, he was carrying a 92 percent batting average—the best among installers through October 2008.[29] Moreover, on October 7, the Company awarded Wulff a $20 gasoline gift card for going the entire month of September without breaking any materials.[30] Notwithstanding this generally favorable picture, Wulff was terminated a few days later.

Upon returning to the Company's facility after completing his installations on October 11, Wulff was called into a meeting with Hochradel and Durfee. At Hochradel's direction, Durfee informed Wulff that he was being terminated because of issues with some of his jobs, his failure to use the seamer, and recent driving incidents.[31] Wulff was handed a termination form, which stated the following circumstances as the basis for the termination:

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[24] The Company did not refute Wulff's credible testimony asserting the lack of merit in all but one of the customer complaints. Nevertheless, I do not find that the complaint portion of the Employee Notice Form was entirely baseless. Smith, although lacking recollection as to the specific jobs listed, credibly testified as to the overall propriety of the PIP. (Tr. 134–135.) Moreover, Wulff's version of the March 21 meeting did not indicate an attempt to refute the complaints. (Tr. 33–34; GC Exhs. 18(p), 26(d), and 26(aa).)

[25] GC Exh. 15(a), pp.5–6, 10.

[26] Although he agreed to reinstate Wulff to lead installer, Hochradel was not involved with the issuance of the PIP. (Tr. 34, 221–225; GC Exh. 18(c).)

[27] Wulff did not produce the pay stubs, but the Company provided no credible evidence to refute Wulff's contention or an explanation that it attempted to correct the problem. (Tr. 36.)

[28] I construed Smith's testimony to indicate that, at some unspecified date in early October, he was no longer a supervisor. (Tr. 111–112.) However, that nuance is inconsequential, given the stipulation that he was a supervisor at all relevant times.

[29] Hochradel conceded, and the Company's records confirmed, that the Company typically included batting averages and the amount of re-cuts attributable to employees in their evaluations. (Tr. 283; GC Exhs. 18–19.)

[30] Wulff's testimony indicates that he was the only installer to receive a gas card prior to October 7, but it is not clear whether he was the only installer to get one on that day – "And I was one of them. And as a matter of fact, up to that point I was the only installer that ever did get gas cards." (Tr. 60–63; GC Exh. 8.)

[31] Even though Hochradel supervised Wulff for only a short time in October 2008 (Tr. 220.), he testified that he made the decision to terminate Wulff on October 9 because of poor workmanship consisting of the latter's failure to use the seamer, lying about the Haraldson job, the prior issuance of a PIP, and after speaking with Smith. His account, however, lacked

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There have been too many instances within the past month where your poor workmanship has led to repair issues. Some of the issues have dealt with your poor seaming. Operations Manager Ray Hochradel spoke to all of the installers during the week of September 8, 2008 about using the seamer to tighten up seams during installation and specifically spoke to you. You said at the time that you did not like using the seamer, but that you would, even though you thought that your seams were tight. Ray spoke to you again on October 8, 2008 to find out how it was working out using the seamer and you said that you had used it only a few times because you did not like using it, but that again you would start using it. This is a blatant disregard to company interest. You should have used the seamer as directed. There are two specific seam issues that have required repair that you installed; HDM+Carson and HDK+Strum. Both of these were inspected by our Senior Field Lead Rob Smith who agreed with the homeowners that the seams were not up to industry standards. Both of these installations have had to have the seams repaired at the company's expense.

There have been several poor workmanship jobs where again in-field repairs will have to be done. HDS+Rowling had a top that was not notched properly in the field. Rob Smith has made one trip already to inspect it and will have to make a second trip to repair. KSI+Haraldson was inspected today and it was found you broke a piece off the back of a top during the install and . . . to glue it back in. The repair is extremely noticeable and will not be covered up by the tiled backsplash that the customer is installing. On the same job there are nicks around the cooktop cut out that were not there when fabricated and you damaged the interior finish of the cooktop cabinet when you cut away some of the supports.

There have been two reported issues with your driving of company vehicles within the past 3 months. The first involved a phone call from a person following you who said that you were weaving all over the road and creating a hazard to other drivers. The second involved you rear-ending a semi-truck. The first instance Ray called you and you were not aware that you were weaving. The second time you said that you drove into the rear of the truck because of road hypnosis. There has [sic] also been many complaints by your team members that you do not have a team attitude.

You were given an Employee Notice Form on 3/27/2008 for poor performance and at that time given a reduction in pay for a period of 90 days. You were able to satisfy the goals of the Employee Notice and were reinstated to full pay and status. However, as employees we cannot continue to chase poor workmanship and again this has become problematic. Therefore: Effective immediately GLGM has no recourse but to terminate your employment.[32]

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credibility in most respects. First, Hochradel conceded on cross-examination that, although the Company preferred that installers use the seamer, the Company manual did not have such a rule and it was not a policy violation if an installer refrained from using it. (Tr. 294; ALJ Exh. 1.) Second, Hochradel never followed up with Wulff after going out to inspect the Haraldson job. Third, Wulff's performance record was better than numerous other installers up to that point; Fourth, Hochradel did not just learn of the PIP, which he was well aware of when he reinstated Wulff to installer in June 2008. (Tr. 67, 72–74, 112, 132–133, 301; GC Exhs. 18(p), 26(w)).

[32] GC Exh. 18(p).

The termination form was incorrect, misleading or unsubstantiated in several respects. First, of the 4 installations noted, only the Haroldson and Strum jobs reflected installation problems attributable to Wulff. Moreover, only the Haraldson job, performed on September 22, was discussed with Wulff prior to Hochradel following up on the customer's complaint on October 9. In that case, Wulff documented the problems, including chips, scratches and cabinet damage, part of which could have been due to the fabrication process.[33] The Strum job had several problems, only one of which—the epoxy color—was Wulff's fault.[34]The report made no reference to Smith's attempt to mollify the customer on the Carson job by explaining that Wulff's seams were in accordance with industry standards.[35] The Rowling job re-cut was not necessarily an installer's fault and could have been caused during fabrication.[36]

With respect to the seamer, Hochradel did instruct installers at a June 2008 meeting to use that device. Wulff explained to Hochradel that he did not like using the seamer and preferred to use wedges while holding the pieces together with clamps. Hochradel simply responded that the Company wanted installers to use a seamer whenever possible."[37] Smith and Hochradel met with Wulff during the latter part of September 2008 regarding the seamer.[38] Smith reported a customer complaint about wide seams on an installation by Wulff and urged him to use the seamer. Hochradel concurred in that request, which Wulff agreed to. A week or two later, Hochradel followed up by asking Wulff how the seamer was working out. Wulff told him that he was having difficulty with the seamer, but was using it in certain instances.[39]

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[33] Hochradel suggested there was deception because Wulff told him that the installation merely had chips which could be covered up when, in fact, he uncovered other problems when he went to the site. (Tr. 250, 254, 258, 261, 294–295.) While not denying fault for damage to the cabinet or the broken piece of granite that was glued in place, Wulff credibly testified that the chips were likely caused during fabrication. (Tr. 42–53.) Moreover, Hochradel's assertion that Wulff lied about the condition of the job was undermined by Wulff's documentation of the job's problems. (GC Exhs. 7, 28; R. Exhs. 5–6.)

[34] Smith explained that Wulff's choice of epoxy color did not match the granite, but the customer's complaints regarding "the flow of the grain of the granite" and a "rough or chippy seam" were likely caused during fabrication. (Tr. 114–116.)

[35] Smith testified that the Carson installation had the same seam issues as the Strum job. (Tr. 117.) Hochradel never went to the Strum or Rowling jobs. (Tr. 283–284.)

[36] Smith corroborated Wulff's credible testimony that problems on the Rowling job were likely due to fabrication. Moreover, Wulff's testimony that improper measurements (by the measurer) also caused the seam problem went unrefuted. In any event, no one ever discussed any of these issues with Wulff prior to his termination. (Tr. 38–42, 116–117; GC Exh. 6.)

[37] Hochradel testified that [i]t's not always possible to use a seamer during an installation." (Tr. 241–242.) He also conceded that it was not a violation of Company rules to resist use of a prescribed tool. Nor is there a written rule in the employee manual requiring use of the seamer. (Tr. 294; ALJ Exh. 1.)

[38] Smith confirmed that Wulff had the highest number of seal complaints (Tr. 136–137.), while Hochradel's abstract produced for trial indicates that Wulff was responsible for 31 percent of the Company's seam repairs between July and September 2008. (Tr. 266–267; R, Exh. 7.)

[39] Wulff conceded that Hochradel and Smith wanted him to use the seamer. However, his testimony that he attempted to use it as requested by Hochradel is consistent with the latter's statement in the termination form and belies any subsequent contention that Wulff was insubordinate. (Tr. 74–76.) Hochradel vaguely alluded to the probability of a handbook provision dealing with insubordination (Tr. 302–303; ALJ Exh. 1.) In any event, Wulff was never disciplined prior to October 11 for failing or refusing to use the seamer. (Tr. 119, 151, 241–242.)

Hochradel's reference to Wulff's driving referred to two incidents earlier that year. In the first instance, someone driving behind Wulff on the highway called and reported to Hochradel that Wulff's truck was weaving all over the road. Hochradel called and spoke briefly with Wulff about the complaint, but they had a lengthier conversation when Wulff returned later to the Company facility. Wulff explained that his truck was swerving on the road because of windy conditions. Hochradel accepted that explanation. The second incident occurred in October 2008. On that occasion, Wulff reported a minor rear-end collision with another truck. However, the other truck, which appeared to have no damage, kept going. Wulff immediately called Durfee to report the incident. He spoke again with Durfee upon returning to the facility. Durfee inspected Wulff's truck and observed minor damage to a fender and a turn signal cover. Neither incident was documented in Wulff's personnel file.[40]

Lastly, the termination form's reference to complaints by "team members" that Wulff did not have a "team attitude" was not documented in Wulff's personnel file. Nor did any supervisors ever bring such alleged complaints or concerns to his attention.[41]

Booms was aware of the decision to terminate Wulff.[42] However, neither Hochradel nor Durfee consulted Smith prior to Wulff's termination. Had they done so, they would have learned that Smith did not have significant performance issues with Wulff at that point.[43] To the contrary,

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[40] Hochradel's testimony essentially corroborates Wulff's version of the incidents. (Tr. 68–72, 234–237.) He also conceded that the incidents were not significant enough to document them in Wulff's personnel file. (Tr. 281–282, 303.) I did not, however, find any connection between Hochradel's subsequent referral of Wulff for drug testing and the driving incidents. In the case of the drug testing – no approximate date provided – Wulff complained of back pain and was sent for a Company physical examination. The physical, which included routine drug testing, revealed that Wulff was taking Butalbital, a prescription drug. Hochradel researched the drug and learned that one of its side effects included drowsiness. He spoke to Wulff about it and the latter explained that it was a prescription medication for migraine headaches. Hochradel accepted the explanation and instructed Wulff not to drive Company vehicles while on medication. He conceded that Wulff complied with his instruction. (Tr. 237–241.)

[41] Neither Hochradel nor Booms mentioned this allegation as a basis for the termination during their testimony (Tr. 209–210, 264–265.)

[42] Booms testified he was not "involved at all" in the decision to terminate Wulff, but was aware that he was terminated for "quality and customer service." (Tr. 209–210.) However, his clearly erroneous statements to a Board investigator on March 24, 2009 convinced me that he was hiding the true extent of his involvement and knowledge. In that letter, he asserted that Wulff was repeatedly warned and engaged in a "pattern of insubordination" – claims never documented – and was issued several Employee Notice Forms and PIPs, when in fact he was issued only one of each. (GC Exhs. 16, 18(p).) Moreover, Booms claimed that he first learned of Wulff's union activity at trial, when in fact he acknowledged such activity in response to Wulff's State wage claim in December 2008 (Tr. 211; GC Exhs. 20, 22.)

[43] I did not credit Hochradel's testimony that Smith came to him and said he was having difficulty with Wulff's jobs in or around October 2008. (Tr. 265, 301.) In earlier testimony, he seemed to indicate that Smith recommended termination prior to the issuance of the PIP in March 2008. (Tr. 205, 220–221; R. Brief at 3.) In any event, Smith, whom I found more credible, explained that no one, including Hochradel, consulted him about Wulff's performance before the termination. In this regard, I placed significance on Smith's unrefuted explanation as to how most of the jobs cited by Hochradel as problematic were not in fact attributable to faulty performance on Wulff's part. (Tr. 144–145.) Also detracting from Hochradel's credibility were his inconsistent explanations in Board affidavits. In one instance, he claimed that the Company

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Smith communicated to Hochradel his concerns with the performance of installers Ben Jackson, Juan Levine and Brendan Williams to Bernal. He also recommended that employees other than Wulff be terminated for poor performance, but management never adopted his recommendation.[44]

Wulff's Organizing Efforts

In or around the beginning of October 2008, Wulff spoke with other installers, helpers and measurers about the Company's pay practices as they loaded their trucks in the mornings and suggested they consider affiliating with a union. These employees included Andrew Clement, Rob Elder, Juan Levine, Josh Petty, Jay Brown and Mark Cumi.[45] He also contacted David Rudolph, a measurer, and asked if he knew which labor organization represented Booms Stone's employees. Rudolph was antiunion, but referred Wulff to Mark Pulaski, a mechanic and driver who performed work for both Booms Stone and the Company.[46] However, when he contacted Pulaski, the latter told him that he already provided Wulff with the name of the union contact.[47]

Upon learning that information, Wulff contacted Tim Ochalek, the Union's field representative. Ochalek advised him to speak to the other employees about their interest in joining a union.[48] Wulff continued speaking with other employees about setting up a meeting with union organizers. Smith learned about those discussions, approached Wulff and asked if he was trying to bring in a union.[49] Wulff acknowledged his efforts to put together such a meeting and asked if Smith would be interested in attending. Smith responded that he was not

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previously wanted to terminate Wulff, but held off because it did not have a qualified person to replace him. In another affidavit, however, Hochradel conceded that Wulff's work was reassigned to someone who was available all along – Smith. (Tr. 286–289.)

[44] Smith confirmed that Wulff's performance record was superior to that of most other employees throughout his tenure with the Company and, at the time of his termination, better than many others. (Tr. 112.)

[45] Cumi, an installer's helper from March through December 2008, was a brief, but credible witness who corroborated Wulff's testimony regarding his organizing efforts. (Tr. 54–56, 88, 91–94,182–184.) He did not provide any details as to whether Wulff spoke with coworkers individually or in a group. Rudolph, however, explained that Wulff spoke with him individually. (Tr. 167–168.)

[46] Booms was initially evasive as to whether Pulaski was employed by both companies ("Could very well be . . . I couldn't say"), but conceded that fact when confronted by a prior deposition. (Tr. 214–216.)

[47] Rudolph, called as a Rule 611(c) witness, was evasive, combative and quite nervous. He evinced an antiunion stance, but conceded that Wulff approached him and he agreed to ask Pulaski about the labor organization connected with Booms Stone. More importantly, Rudolph corroborated Wulff's hearsay testimony that he spoke with Pulaski about the union. (Tr. 56–57, 90, 168–169, 175.)

[48] Ochalek, who corroborated Wulff's testimony on this point, seemed tentative and calculating in his testimony. He did, however, confirm the Union's past history of attempting to organize the Company and acknowledged that he enjoyed a good relationship with Booms as the labor representative for Booms Stone's bargaining unit employees. (Tr. 57, 155, 158, 201.)

[49] The evidence was unclear as to whether Smith was still a supervisor at that point, since Hochradel took over his field supervisor responsibilities in early October. (Tr. 111–112.) However, the parties stipulated that Smith was a supervisor at all relevant times. (Jt. Exh. 1.)

sure if he would attend and cautioned Wulff that Booms once told him he would close the Company if the Union ever obtained recognition as the employees' labor representative.[50]

Wulff had another discussion conversation with Ochalek on October 5 or 6. Based on Ochalek's instructions, Wulff informed other installers during the morning of October 9 that he was organizing a meeting with a union representative for October 11.[51] One of those employees, Jay Brown, told Wulff later that day that "they know, watch your back, Mark ratted you out."[52] Brown's warning became a reality when Hochradel and Durfee terminated Wulff 20 minutes later.[53]

The Company's Subsequent Antiunion Actions

The next day, on October 10, Hochradel informed the installers that they would be required to resign as employees and be retained as independent contractors. The Company previously stated it would never institute such a plan. Curiously, although there was some prior interest on the part of some employees to convert to independent contractors, the Company always rejected that idea. All of the remaining employees agreed to the new arrangement, which took effect on October 31.[54]

The Respondent's Treatment of Other Employees

Based on Boom's belief that "mistakes are part of the process, we all make them, no one is perfect," the Company typically issued multiple Employee Notice Forms and PIPs to

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[50] Smith's testimony further corroborates Wulff's contention that he was speaking with other employees about the Union. However, although Smith explained that Booms' remarks were made 3–4 years earlier during the Union's attempt to establish Booms Stone as the alter ego of the Company, there is no indication that he told Wulff the timing of Booms' statement. (Tr. 58–60, 89, 121–123, 138–139.) Booms tersely denied knowledge of any union activity, but did not refute Smith's testimony regarding their conversation several years earlier. (Tr. 210–211.)

[51] Wulff's testimony regarding the scheduled meeting was corroborated by Ochalek and Smith. (Tr. 64–65, 121–123, 159.)

[52] The Company did not object to Wulff's hearsay testimony regarding Brown's warnings. (Tr. 66, 77, 96–97.)

[53] I did not credit the terse denials by Booms and Hochradel regarding their knowledge of Wulff's union organizing activity in October. Booms initially denied ever having any discussions with Olcheski about the Union's interest in organizing the Company's employees. However, while attempting to understate his knowledge ("It was my understanding"), he conceded on cross-examination that the Union commenced a lawsuit several years earlier in an attempt to represent the Company's employees. (Tr. 210–212.) Hochradel attempted to bolster his denial by alluding to earlier membership in a police officer's union, but it was evident from his Company role and responsibilities that he was close to Booms and, thus, privy to the latter's wishes. (Tr. 279–280.) I base that conclusion upon the significant responsibilities assigned to Hochradel even though he had no prior background in marble and granite, as well as the absence of evidence that Hochradel answered to anyone other than Booms.

[54] Smith's explanation of the post-termination changes was corroborated by Company memoranda. (Tr. 126–128, 141–143; GC Exhs. 14(a)–(c), 27). However, I did not credit his irrelevant testimony regarding the lack of attendance at the October 11 union meeting. (Tr. 124.)

employees before resorting to termination.[55] In Wulff's instance, however, the Company did not even consider issuing him another prior to his termination.[56]

As previously stated, at the time of Wulff's termination, installers Jackson, Williams and Levine all had inferior performance records compared to Wulff. While Smith never recommended that Wulff be terminated, he did recommend termination for Jackson, Williams and Levine. However, the Company did not implement any of his recommendations.[57] Such inaction reflected the Company's practice of providing employees with several opportunities to improve performance. In fact, during 2007 and 2008, the Company issued multiple Employee Notice Forms for performance and other reasons to at least six employees who remain employed: Rudolph (five);[58] Juan Levine (two);[59] Ben Jackson (two);[60] Enver Melkick (two);[61] and Josh Petty (two).[62]

Termination was reserved for the most extreme situations. Doug St. Louis was terminated in August 2008 after being issued four Employee Notice Forms for performance within a 4-month period.[63] Michael O'Dea was issued three Employee Notice Forms in 2008, but was not terminated until after he missed work again and told Hochradel he was looking for other work.[64] Mike Brewis was placed on two PIPs in 2007 prior to termination.[65] Phillip Brown was issued Employee Notice Forms in July and September 2008, but was not terminated until November 2008, after failing to report for work for 6 days that month.[66]

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[55] GC Exh. 18(c), pp. 1–2.

[56] Hochradel was unable to provide any explanation as to why Wulff was not afforded the benefit of a second PIP, except to rely on Smith's alleged recommendation. He also alluded to other unspecified people that he spoke to in the Company about the decision. (Tr. 121, 172, 174, 300–302; GC Exhs. 18(c), 18(n). Other than Booms and Durfee, I do not find that Hochradel spoke to anyone about terminating Wulff. As previously noted, I did not credit his testimony that Smith recommended Wulff's termination in October 2008. (Tr. 144–145.)

[57] Smith's explanation as to his recommendation history went unrefuted. (Tr. 120, 152–153.)

[58] The most recent Employee Notice Form was issued to Rudolph on August 4, 2008. It referred to a "reoccurring pattern" of customer complaints about his attitude and noted similar Employee Notice Forms from September 2007 and February 2008, and a June 2008 counseling for another customer complaint. Although he was given the option of resigning, he was still employed as of October 13, 2009. (GC Exh. 18(c), Tr. 167.)

[59] Levine was also issued a PIP for 90 days, but did not receive a pay reduction at that point. The second Employee Notice Form was issued prior to the expiration of the 90-day period. (GC Exh. 18(g); Tr. 282.)

[60] The Employee Notice Forms occurred in 2007 and he resigned in February 2008. (GC Exh. 18(a).)

[61] Melkick was issued 2 Employee Notice Forms within a 10 month period in 2007 and 2008, and was terminated several months later pursuant to "workforce reduction." (GC Exh. 18(j).)

[62] Petty was issued 2 Employee Notice Forms for attendance within a 3-month period. (GC Exh. 18(o).)

[63] The termination form indicated that St. Louis was continuously issued Employee Notice Forms because he, like Wulff, was able to meet the goals set forth in the previous one. (GC Exh. 18(n).)

[64] GC Exh. 18(l).

[65] Only one Employee Notice Form was included in the record, but it referred to two PIPs and based termination on Brewis' failure to follow the conditions set forth in the second PIP. (GC Exh. 18(k).)

[66] The termination notice referred to two Employee Notice Forms when, in fact, another one

Continued

In other instances warranting termination, the Company afforded employees an opportunity to resign or simply issued another Employee Notice Form. Sulejman Zalic was terminated in 2007 after unleashing a 2-day rampage in which he stalked, harassed, and assaulted a coworker. Another, coworker David Heur, intervened and Zalic attacked him as well. Rather than terminate Zalic, the Company gave him the option of resigning. Zalic opted to resign, but the Company documented that he threatened to return to fight Heur as he bid farewell to coworkers. However, it was a short-lived separation. The Company reinstated Zalic 14 days later, albeit with a demotion, after making him apologize to his coworkers.[67] Justin Osbourne received three Employee Notice Forms for missed hours before resigning in July 2007.[68] David Heur was issued five Employee Notice Forms for theft and other serious misconduct within an 8-month period before resigning in November 2007;[69] Brandon Williams received two Employee Notice Forms for missing hours before resigning in 2007, was reinstated and resigned again in May 2008.[70] Jose Gomez opted to resign after being issued two Employee Notice Forms for performance in April 2008.[71]

Legal Analysis

The complaint alleges that the Company discharged Wulff on October 11 because he engaged in protected concerted activity on behalf of Local 1199. The Company disputes that charge and contends that Wulff was discharged because of poor performance and other conduct.

Section 8(a)(3) of the Act provides, in pertinent part, that it is "an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under the Board's standard set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must prove by a preponderance of the evidence that union animus was a motivating or substantial factor for the adverse employment action. Such a showing generally requires proof that the employee engaged in union or other protected concerted activity, and the employer knew of such activity and exhibited antiunion animus. See, e.g., *Desert Springs Hospital Medical Center*, 352 NLRB 112 fn. 2 (2008); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. _F.3d_, 2009 WL 2526487 (2d Cir. Aug. 20, 2009). The Board has also required, on certain occasions, proof of a causal nexus between the union animus and the adverse employment action. See, e.g., *Reliable Disposal, INC.*, 348 NLRB 1205, 1210 fn. 4 (2006); *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1224 fn. 11(2004); *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). If the General Counsel makes the required initial showing, the burden of persuasion shifts to the

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was issued in July 2008 for unauthorized removal of Company property for personal use. (GC Exh. 18(d).)

[67] Levine initially escalated the argument by cursing at Zalic, but was not disciplined. In any event, aside from assisting Levine to escape Zalic, there seemed to be little involvement by management to control Zalic's behavior during the 2-day period. (GC Exh. 18(b).)

[68] The 3 Employee Notice Forms were issued within a 2-month period. Osbourne resigned 11 days later because he was moving. (GC Exh. 18(h).)

[69] Heur's five Employee Notice Forms were issued within an 8-month period. (GC Exh. 18(e).)

[70] Williams resigned several months later for other reasons. (GC Exh. 18(m).)

[71] The Employee Notice Forms and PIPs were issued within a 2-week period. (GC Exh. 18(f).)

employer to prove that it would have taken the same action even in the absence of the employee's protected activity.

There is clear evidence that Wulff engaged in protected activity. Concerned that the Company was making improper deductions from his wages, he discussed the problem with coworkers on several occasions. One of those individuals was Dave Rudolph, who he asked about the name of the union that represented Booms Stone employees. Rudolph, who conveyed strong antiunion sentiment at trial, agreed to ask Mark Pulaski, an employee who did work for both the Company and Booms Stone. Before he could get an answer, Wulff spoke with Pulaski, who passed along the union contact information. Wulff contacted Ochalek, the Union representative. Ochalek advised Wulff to canvass his coworkers to see if there was interest in meeting with him. Wulff complied by reaching out to coworkers. In the course of reaching out, however, Wulff was approached by Smith. Smith heard of Wulff's union activity from coworkers and confirmed Wulff's involvement. He declined Wulff's invitation to attend the union organizing meeting. He did, however, share Booms strong antiunion sentiment and previous threat to close the facility if the union ever came in, thus providing the element of animus on the part of Booms.

With respect to the element of knowledge on the part of the Company, the Company tenders several approaches. The first is that I draw adverse inferences that Durfee and Bernal, who the Company did not call as witnesses, would have testified as to the Company's knowledge of Wulff's union activities. It is well settled "that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." See *Daikichi Sushi*, 335 NLRB 622 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003), citing *International Automated Machine*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). In that regard, it is important to note that I credited Wulff's testimony regarding the supervisory roles played by Durfee and Bernal, his complaints about his pay to Durfee, Durfee's statements revealing a retaliatory motive for disciplining Wulff in March, and Durfee's statements at the termination meeting. While it is clear that Durfee and Bernal played significant roles enforcing and defending the Company's pay practices, that background is insufficient to establish a foundation for an inference that Booms or Hochradel ever confided in Durfee or Bernal about Wulff's union activities. Durfee attended the October 11 termination along with Hochradel. However, Hochradel, Booms' top field manager, testified about that meeting, as well as the circumstances leading up to it. Under the circumstances, I decline to exercise my discretion to draw an adverse inference that, had Durfee and Bernal been called as witnesses, they would have testified that the Company had knowledge of Wulff's union activities. *Roosevelt Memorial Medical* Center, 348 NLRB 1016, 1022 (2006) (no basis for drawing adverse inference where other record evidence made absent witness' testimony necessary); *Engineered Steel Concepts, Inc*., 352 NLRB 589, 608 fn. 22 (2008) (no need to draw adverse inference where judge finds that requesting party's witnesses were more credible on the disputed issue).

The General Counsel's most compelling argument that the Company possessed the requisite knowledge of Wulff's union activities is premised on Smith's knowledge that Wulff was organizing a union meeting. Although Smith was relieved of his supervisory responsibilities some time in October, the parties stipulated that he was a statutory supervisor at all material times. The significance of that fact is that Smith was a statutory supervisor when Smith informed him that he was organizing a meeting with a union representative. As a supervisor, Smith's knowledge was imputable to the Company. See *Foothill Sierra Pest Control, Inc.*, 350 NLRB 26, 29 (2007), citing *State Plaza, Inc.*, 347 NLRB 755, 756 (2006). As noted by the General Counsel, the facts here are similar to those in *Jenkins Index Company*, 273 NLRB 736, 743 (1984), where the discriminatee told a supervisor about an upcoming union meeting. The supervisor warned the employee that the employer would fire anyone caught signing an

authorization card. He did not, however, participate in the decision to terminate the discriminatee. Under the circumstances, the Board still found it appropriate to impute to the employer the supervisor's knowledge and I arrive at the same conclusion here.

The General Counsel also relies on Wulff's hearsay testimony that coworker Phillip Brown, who did not testify, told Wulff that "they know, watch your back, Mark [Pulaski] ratted you out." Although the Company did not object to such testimony at trial, my practice, as often stated at trial, is to credit only hearsay testimony that is reliable, probative or corroborated by other evidence. See *Alvin J. Bart & Co.,* 236 NLRB 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2nd Cir. 1979); *Dauman Pallet Inc.*, 314 NLRB 185, 186 (1994); *Livermore Joe's, Inc.*, 285 NLRB 169 fn. 3 (1987); *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980). Wulff and Rudolph both testified that Pulaski was aware of Wulff's interest in contacting the Union and provided Wulff with that information. The essence of Brown's probative statement – that Pulaski took that information one step further by reporting it to management – constitutes a form of double hearsay, which requires corroboration before it can be deemed reliable. Brown's statement is, however, corroborated by a combination of factors: Smith's earlier warning regarding Boom's antiunion sentiments; the timing of the suddenly convened termination meeting a few minutes later; testimonial indication of union animus by Rudolph, who served as Wulff's informational conduit to Pulaski; and the Company's failure to refute the statement with testimony by Pulaski. Under the circumstances, I accorded some weight to Brown's statement. See *Teamsters Local 705 (Pennsylvania Truck Lines)*, 314 NLRB 95, 98 fn. 4 (1994). However, given the vagueness of the reference to an unspecified member of management ("they"), I am not convinced that such a statement, in and of itself, possesses sufficient quality to support a conclusion that the Company knew of Wulff's union activities.

Coupled with other evidence, however, Brown's hearsay statement provides a foundation for the General Counsel's application of the "small plant doctrine" to the facts of this case. Citing Judge Buxbaum's application of the doctrine in *Frye Electric*, 352 NLRB 345, 351 (2008), the General Counsel contends that Wulff's conversations with coworkers were likely overheard or shared with management. The facts in *Frye Electric* portray a different scenario than the one that existed here. In that case, the close working environment in a small factory setting made it likely that management would notice employees' activities and, thus, be primed to glean discussion of protected activity. See also *LaGloria Oil & Gas Co.,* 337 NLRB 1120, 1123 (2002), affd. 71 Fed. Appx. 441 (5th Cir. 2003); *D & D Distribution Co. v. NLRB,* 801 F.2d 636 at fn. 1 (3d Cir. 1986); and *Wiese Plow Welding Co.,* 123 NLRB 616 (1959).

Here, the evidence indicates that Wulff spoke with individual coworkers as they loaded their trucks outside the rear of the facility and there was no direct evidence that management was in a position to overhear or notice anything unusual about such conversation. There was clear evidence, however, that at least one coworker broadcast his union-related discussions with Wulff to at least one supervisor – Smith. Smith approached Wulff and confirmed hearing about his organizing efforts. Coupled with other circumstantial evidence, including Brown's statement that management knew about Wulff's activity, and Wulff's termination a few minutes later, there is sufficient evidence to support a finding of Company knowledge based upon the small plant doctrine.

The last element of the General Counsel's *prima facie* case requires sufficient proof of a connection between the Company's union animus and Wulff's termination. As in the case of knowledge, the direct evidence and circumstantial evidence in the record may be relied upon in assessing the existence of unlawful motivation on the part of the Company. *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); enfd. mem. 179 LRRM 2954 (6th Cir. 2006); *Ronin Shipbuilding*, 330 NLRB 464 (2000). Relevant considerations here include the inconsistencies

between the Company's proffered reason for Wulff's termination, the disparate treatment in how Wulff was treated compared to other employees with similar work records, the Company's deviation from past practice, and the proximity in time of the termination to Wulff's union activity. See, e.g., *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), petition for review dismissed 2004 WL 210675 (D.C. Cir 2004), citing *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

The timing of Wulff's termination was utterly suspicious. Wulff was terminated during a period of time that he was engaged in union activity, within days after speaking with a supervisor about that activity, and 2 days before the scheduled union meeting. All of the pertinent events occurred within short proximity to the discipline and, thus, support an inference of unlawful discrimination. See *McLendon Electrical* Services, 340 NLRB 613, 613 fn. 6 (2003).

Aside from the timing, the reasons given for the termination were clearly pretextual. *El Paso Electric Co.*, 350 NLRB 151, 152 (2007); *Amber Foods, Inc.*, 338 NLRB 712, 715 (2002). Wulff's performance in 2008 was mixed at worst. Even considering Smith's testimony that Wulff's performance declined after he was issued a PIP in March and had the highest amount of seam complaints, Wulff continued to avoid costly recuts and broken pieces, had the best batting average among installers, and was awarded a gift card for his September performance about a week before his termination.

Even assuming that Wulff performed poorly in 2008, his record was equal or superior to several other coworkers who were not disciplined. The Company also deviated from its past practice of issuing employees two or more Employee Notice Forms before imposing discipline. In Wulff's case, Hochradel never even discussed three of the four jobs listed in the termination form with Wulff. He did not even consider whether to afford Wulff the benefit of a second Employee Notice Form or PIP. Instead, Hochradel testified that his alleged review of Wulff's record was triggered by Smith's October recommendation, but the credible evidence reveals that Hochradel did not consult Smith about disciplining Wulff at or around that time. Such evidence of disparate treatment alone supports an inference of unlawful motivation. *Publix Supermarkets, Inc.*, 347 NLRB 1434, 1438 (2006).

The Company also purportedly relied on two driving incidents that occurred several months earlier in 2008, but it accepted Wulff's explanations and did not consider them significant enough at the time to document in Wulff's personnel file. The inclusion of these incidents, long after they occurred, reflects an effort by the Company to pile on the grounds for termination and constitutes yet another example of pretext. *Conley Trucking*, 349 NLRB 308, 323 (2007).

Lastly, the Company's announcement the day after Wulff's termination—that the installers would be required to convert from employee to independent contractor status—serves as further evidence that the Company was exorcizing any potential remaining for future union organizing. Under all of the circumstances, I conclude that union animus was the motivating force behind Wulff's termination. Having met all of the essential elements of a prima facie violation of Section 8(a)(3) of the Act, the Company's motion to dismiss at the conclusion of the General Counsel's case is denied.

As the General Counsel established that Wulff was terminated due to union animus, the burden shifted to the Company to prove that Wulff would have terminated him even in the absence of such activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 965 (2004). Such a task is unattainable here where, as previously explained, the evidence establishes pretext for the Company's adverse action. *United Rentals*, 350 NLRB 951, 952, citing *Golden State Foods*

Corp., 340 NLRB 382, 385 (2003). Based on the foregoing, the Company terminated Wulff on October 11 in violation of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. The Great Lakes Granite and Marble Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Bricklayers and Allied Craftworkers, Local 1 is labor organizations within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(3) and (1) of the Act by discharging Eric Wulff on October 11, 2008 because he engaged in activities in support of the Union.

4. By engaging in the conduct described above, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[72]

ORDER

The Respondent, Great Lakes Granite and Marble Company, Redford, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the Bricklayers and Allied Craftworkers, Local 1 or any other union.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[72] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of the Board's Order, offer Eric Wulff reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Eric Wulff whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Redford, Michigan, copies of the attached notice marked "Appendix."[73] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since October 11, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. February 23, 2009

Michael A. Rosas
Administrative Law Judge

[73] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities supporting the Bricklayers and Allied Craftworkers, Local 1or any other union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Eric Wulff full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eric Wulff whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Eric Wulff, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

GREAT LAKES GRANITE
AND MARBLE COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue
Room 300
Detroit, Michigan 48226-2569
Hours: 8:15 am - 4:45 pm
313-226-3200

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3200.